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No. 90-506

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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ALICE ORSINI, o/b/o MEGAN R. ORSINI, PETITIONER

*v.*

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held, based upon *Mathews* v. *Lucas*, 427 U.S. 495 (1976), that provisions in the Social Security Act determining eligibility for child's insurance benefits do not unconstitutionally discriminate against illegitimate children.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 903 F.2d 1393. The opinion of the district court (Pet. App. B1-B2) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 22, 1990. The petition for a writ of certiorari was filed on September 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 202(d) of the Social Security Act, 42 U.S.C. 402(d), provides that when an insured wage earner has died, his or her children are entitled to child's insurance benefits if they were dependent upon the wage earner at the time of death and they satisfy certain other requirements. Under Section 202(d)(3), 42 U.S.C. 402(d)(3), a child is deemed dependent upon the decedent if, at the time of death, the decedent was "living with or contributing to the support of such child." However, a deceased father's child need not make an individualized showing of dependency if (1) the child was the decedent's legitimate child; (2) the child would be entitled to inherit the decedent's personal property under the applicable state intestacy law; (3) the decedent and the child's mother went through a marriage ceremony that would have been valid but for a nonobvious legal defect; (4) the decedent acknowledged in writing that the child was his; (5) a court decreed the decedent to be the child's father; or (6) a court ordered the decedent to support the child because the child was his. *Mathews* v. *Lucas*, 427 U.S. 495, 498-499 & nn. 1-3 (1976) (citing 42 U.S.C. 402(d)(1), 402(d)(3), 416(h)).

2. Petitioner Alice Orsini (Alice) is the mother of Megan Orsini (Megan), an illegitimate child. Megan's father, Michael T. Orsini (Michael), was a fully insured wage earner under the Social Security Act at the time of his death. Pet. App. A4. Michael and Alice were never married and never lived together. Each was self-supporting. *Ibid.* (Alice and Megan took the last name Orsini by means of a name change after Michael's death. *Id.* at A4 n.1.) Megan

was conceived approximately one week before Michael's death; Michael died, without becoming aware of Alice's pregnancy, more than eight months before Megan's birth. *Id.* at A9, F8. After Megan was born, Alice arranged for a paternity test. The test reported a 99.8% likelihood that Michael was Megan's father. *Id.* at A4.

Alice applied for Child's Survivors Insurance benefits on behalf of her daughter. An administrative law judge found that Megan was Michael's biological daughter, but denied the claim because Megan could not satisfy the statute's dependency requirement. Pet. App. A5, F1-F16. After exhausting her administrative remedies, Alice sought judicial review in the United States District Court for the Middle District of Florida. *Id.* at A5-A6. The district court upheld the denial of benefits. The court concluded that none of the presumptions of dependency was applicable and that the evidence established that Michael had not lived with Megan or contributed to her support prior to his death. *Id.* at C7-C13.

3. On appeal, petitioner contended that the statute's dependency provisions discriminate against illegitimate children in violation of the equal protection component of the Fifth Amendment. The court of appeals rejected that contention, finding that the same argument had "already been directly considered and rejected" by this Court in *Mathews* v. *Lucas*, *supra*. Pet. App. A19. *Lucas*, the court of appeals explained, held that the Social Security Act's child dependency presumptions "are reasonably related to the likelihood of dependency at the time of the death of the insured, and, as such, are justified by administrative convenience and do not impermis-

sibly discriminate against children required to prove dependency." Pet. App. A19.[1]

## ARGUMENT

Petitioner contends that the dependency provisions of the Social Security Act violate the Fifth Amendment guarantee of equal protection, since they obligate illegitimate children to demonstrate actual dependency in situations in which legitimate children are relieved of that burden. As the court of appeals recognized, however, this Court rejected the same contention in *Mathews* v. *Lucas*, *supra*. There have been no intervening developments that justify reconsidering this issue. Further review is therefore not warranted.

*Lucas* involved an indistinguishable challenge to the Social Security Act's Child's Insurance Benefits provisions. In that case, the illegitimate children of a deceased wage earner claimed that Congress, at least in cases where paternity was clear, could not constitutionally presume that legitimate children were dependent on their fathers, while requiring illegitimate children to prove their dependency. 427 U.S. at 502. The government responded that the statute was designed "to provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths" and that the dependency provisions are reasonably related to that objective. *Id.* at 507. This Court sustained the government's position. The Court held that "conditioning entitlement upon de-

[1] The court of appeals also rejected petitioner's claim that Megan had sufficiently established her dependency within the framework of the statute. Pet. App. A7-A18. The petition does not seek further review of that question. Pet. i.

pendency at the time of death is not impermissibly discriminatory," *ibid.*, and that "the statutory classifications are permissible * * * because they are reasonably related to the likelihood of dependency at death," *id.* at 509.

In suggesting that the reasoning of *Lucas* has been undercut by the increased availability of the HLA test as a reliable means of establishing paternity (Pet. 14-15, 19, 20-22), petitioner fundamentally misconceives the statutory scheme and the rationale of *Lucas*. The purpose of the dependency and support provisions is not, as petitioner suggests, "only to determine if the applicant is the child of the wage earner" (*id.* at 15; see *id.* at 9). Paternity alone is insufficient to establish eligibilty for benefits; dependency is also required. The provisions at issue in this case address the latter requirement. As this Court noted in *Lucas*, they embody "reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death." 427 U.S. at 510; see *id.* at 515-516.[2] The Act uses a child's legitimacy as one of several indicators of dependency; it does not use dependency as an indicator of paternity. The availability of the HLA test, which allows more reliable determinations of paternity (but not dependency), is thus immaterial to the justification for the Act's support and dependency provisions. Increased

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[2] Indeed, in *Lucas*, the agency determined that the children seeking benefits were biological offspring of the deceased father. 427 U.S. at 500-501. As in this case, the sole issue was whether they satisfied the statute's dependency requirement.

use of the HLA test casts no doubt on the continuing validity of *Lucas*.

For essentially the same reasons, petitioner's reliance (Pet. 25-27) on *Clark* v. *Jeter*, 486 U.S. 456 (1988), and *Pickett* v. *Brown*, 462 U.S. 1 (1983), is misplaced. Both of those cases held that state statutes of limitations applicable to actions *to establish paternity* were unconstitutional. In reaching that conclusion, the Court noted that the availability of scientific means of establishing paternity, including the HLA test, had undercut the relationship between the States' interest in preventing the litigation of stale or fraudulent paternity claims and the challenged statutes of limitations. 462 U.S. at 17-18; 486 U.S. at 464-465. However, in those cases, the ultimate issue was paternity—not, as in this case, dependency. There is thus no conflict between the court of appeals' decision and the decisions in *Clark* and *Pickett*.[3]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner also relies upon *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Lucas*, however, this Court explained at length how the statutory provisions at issue in *Jimenez* are distinguishable from those involved here. 427 U.S. at 511-512.

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